

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-A-TARA ROHE**

[2025] NZERA 244
3316460

BETWEEN	DAMITH SURANGA PATHIRANALAGE Applicant
AND	AMAA & KASH 23 LIMITED (IN LIQUIDATION) First Respondent
AND	NISHAN INDIKA NAVARATNE DE ALWIS Second Respondent

Member of Authority:	Natasha Szeto
Representatives:	Dhilum Nightingale, counsel for the Applicant Nishan Navaratne de Alwis for the Respondents
Investigation Meeting:	29 January 2025 in Wellington
Submissions and information received:	5 and 28 February, and 16 April 2025 from the Applicant 28 February 2025 from the Respondent (by AVL)
Date of Determination:	02 May 2025

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] Damith Pathiranalage was recruited from Sri Lanka and employed by Amaa & Kash 23 Limited (In Liquidation) (AKL) to work as a chef at a Sri Lankan restaurant trading as The Cinnamon Tree. The restaurant was struggling and after only five

months Mr Pathiranalage left his employment because he was not being paid. Around seven months later, AKL went into liquidation.¹

[2] Mr Pathiranalage asks the Authority to make findings that AKL has breached the Wages Protection Act 1983 (WPA), Minimum Wage Act 1983 (MWA) and Holidays Act 2003 (HA), and that Mr Navaratne de Alwis was a person involved in those breaches. The liquidator has not given permission for the proceedings against the company to continue, so Mr Pathiranalage asks the Authority for leave to pursue any debt he is owed against Mr Navaratne de Alwis personally. He also asks the Authority to order interest, a penalty and costs.

The Authority's Investigation

[3] A written witness statement was lodged by Mr Pathiranalage. Mr Navaratne de Alwis did not lodge a statement in reply, a written statement or provide written submissions. However, both parties attended the Investigation Meeting, and answered questions under oath or affirmation.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified the orders made. It has not recorded all the evidence and submissions received, but all information submitted to the Authority has been carefully considered.

Issues

[5] The issues the Authority is to investigate and determine are:

- (a) Whether Mr Pathiranalage is owed wage arrears of \$7,079.80 (gross) and annual leave of \$925.33 in that:
 - (i) AKL breached s 4 of the WPA by not paying the entire amount of wages due to Mr Pathiranalage; and
 - (ii) AKL breached ss 4 and 6 of the MWA by not paying Mr Pathiranalage not less than the minimum wage for each hour worked between 16 January and 11 February 2024; and

¹ In liquidation from 23 September 2024.

- (iii) AKL breached the HA by not paying Mr Pathiranalage his annual holiday entitlements amounting to \$925.33.
- (b) Whether the Authority should award interest on any arrears.
- (c) Whether Mr Navaratne de Alwis was a person involved in breaches of employment standards by being a director who aided, abetted, counselled or procured the breaches and (if so) whether the Authority should grant leave for arrears to be recovered from Mr Navaratne de Alwis.
- (d) Whether the Authority should impose a penalty on Mr Navaratne de Alwis under s 134 of the Act, to be paid to Mr Pathiranalage.
- (e) Costs and disbursements.

Relevant Background

[6] Mr Navaratne de Alwis is the sole director of AKL which owned and operated a Sri Lankan restaurant in Wellington trading as Cinnamon Tree. Mr Navaratne de Alwis recruited Mr Pathiranalage from Sri Lanka and persuaded him to come to work as a chef at Cinnamon Tree. Mr Navaratne de Alwis was responsible for hiring all employees for AKL and signed Mr Pathiranalage's individual employment agreement on behalf of AKL on 21 July 2023. The agreement included a term that Mr Pathiranalage would work for a minimum of 40 hours and maximum of 50 hours per week from Monday to Sunday and would be paid \$30.00 (gross) per hour weekly into his nominated New Zealand bank account.

[7] Mr Pathiranalage moved to New Zealand in October that year to work for AKL and started work at the restaurant on 12 October 2023. Mr Navaratne de Alwis set the roster and Mr Pathiranalage along with all other employees wrote down their hours in a "counter-book". This book was supposedly taken from the restaurant by Mr Navaratne de Alwis at the end of every week and used to pay wages. In reality, Mr Navaratne de Alwis paid staff on the basis of the roster and did not really refer to the book. Mr Navaratne de Alwis understood Mr Pathiranalage was on a 30-hour per week roster with limited variation when he worked longer hours, and he paid Mr Pathiranalage on that basis using an app-based system called "Thankyou Payroll". Once Mr Navaratne de Alwis approved the final pay through the system it was locked

and could not be changed, and a payslip was automatically emailed to the relevant employee.

[8] A while after he started working for AKL, Mr Pathiranalage started getting suspicious that pages were being removed from the counter-book. Around two to three months into his employment, he borrowed the book from the restaurant and transposed a record of his hours over to a “reminders” note function in his phone.

[9] Both parties agree that Mr Navaratne de Alwis paid Mr Pathiranalage some of his wages in cash, although Mr Navaratne de Alwis could not remember when. Mr Pathiranalage, on the other hand, had also used the “reminders” note function in his phone to record the cash payments he received from Mr Navaratne de Alwis on 15 October 2023 (\$350), 26 October 2023 (\$350) and 8 January 2024 (\$754).

[10] Mr Pathiranalage says he did not take proper unpaid meal breaks during his employment and therefore the hours he claims to have worked are the hours he was at the restaurant.² Although Mr Navaratne de Alwis was not at work in the restaurant during most of Mr Pathiranalage’s shifts, he takes no issue with Mr Pathiranalage’s evidence that workers did not take “official” unpaid 30 minute meal breaks, but says this is because they were not that busy, there were no customers, and they did not need to take a break.

[11] Mr Pathiranalage was not paid wages for the final four weeks of his employment between 16 January 2024 and 11 February 2024. He told Mr Navaratne de Alwis that even though he had worked for four weeks, he had to be paid for at least two weeks in order to send money back to his family. Mr Navaratne de Alwis told Mr Pathiranalage that there was no money and he would not be able to pay him. Mr Navaratne de Alwis also told Mr Pathiranalage that he could not afford to employ him, so Mr Pathiranalage had to stop working and he could offer him some help securing future employment elsewhere.

[12] Mr Pathiranalage left his employment in March 2024. Mr Navaratne de Alwis paid him \$1,000.00 in cash for flights back to Sri Lanka, and Mr Pathiranalage left New Zealand shortly after.

² Section 69ZD of the Act - *Employee’s entitlement to, and employer’s duty to provide, rest breaks and meal breaks.*

[13] On 25 April 2024, Mr Pathiranalage raised a personal grievance. He lodged a statement of problem in the Authority in August 2024. From 23 September 2024, AKL was placed into liquidation. On 2 October 2024 the liquidator declined consent to commence or continue legal proceedings against the company. Accordingly, Mr Pathiranalage's claims against AKL as the first respondent cannot proceed and this determination only resolves his claims against Mr Navaratne de Alwis.

Wage arrears claim

[14] The Authority is able to accept as proved all claims made by an employee in respect of wages paid to the employee and the hours, days and time worked by them in the absence of proof to the contrary.³ Mr Pathiranalage provided a detailed breakdown of the wages and annual holiday entitlements he says he is owed.⁴ His wage arrears claim totals \$7,079.80 (gross).

[15] Mr Navaratne de Alwis says he did not read the agreement properly, did not follow the counter-book where staff recorded their hours, and he paid Mr Pathiranalage on the basis of a 30-hour fixed rostered basis every week. On 17 June 2024, AKL emailed Mr Pathiranalage's representative a table of its calculations of Mr Pathiranalage's losses.⁵ Mr Navaratne de Alwis says he and his business partner calculated that AKL owed Mr Pathiranalage 259 hours, or \$6,670.00 (gross).⁶ This was based on Mr Pathiranalage's working week being generally from 12:00 pm to 9:00 pm six days per week and not seven. Mr Navaratne de Alwis says Mr Pathiranalage did not work over 40 hours in any week because there was no turnover, no business, and no customers. While Mr Navaratne de Alwis acknowledges the four-week period when Mr Pathiranalage was not paid in 2024, he says Mr Pathiranalage agreed verbally to be paid for two weeks.

[16] Based on the evidence before the Authority, I am satisfied there has been a default in the payment of money by AKL due to a breach of employment standards. Prior to liquidation, AKL acknowledged Mr Pathiranalage was owed very close to the amount he now claims by way of wage arrears for the shortfall in his paid hours and for its failure to pay Mr Pathiranalage's wages in the four-week period from January to

³ Section 132(2) of the Act.

⁴ Appendix A attached to Mr Pathiranalage's witness statement.

⁵ Table E attached to the statement of problem.

⁶ Attachment E – Respondents' record of payments owing to the Applicant.

February 2024. Mr Navaratne de Alwis' only response to the default was that AKL could not have afforded to pay Mr Pathiranalage for 40 hours, and the business did not have the money to pay him, so it did not pay.

[17] AKL was contractually obligated to pay Mr Pathiranalage what it had agreed to in his employment agreement and it did not do so. I find that Mr Pathiranalage has not received wages due from AKL of \$7,079.80 (gross).

Holiday pay claim

[18] Mr Pathiranalage was entitled to be paid annual holiday pay of 8% of his gross earnings since the commencement of his employment, less any amount already paid.⁷ Mr Pathiranalage's gross earnings in this period should have been \$27,570.00⁸ meaning his total holiday pay should have been \$2,205.60 (gross). According to his bank records, his available payslips and his own calculations, Mr Pathiranalage received holiday pay of \$1,280.27 (gross) on 12 April 2024.

[19] Mr Navaratne de Alwis does not accept Mr Pathiranalage's holiday pay claim, because he says that holiday pay was calculated and paid through the payroll system. However, Mr Navaratne de Alwis overlooks that the amount of holiday pay was calculated based only on the wages that went through the payroll system and does not include the shortfall in Mr Pathiranalage's wages that I have found are owing.

[20] Accordingly, I accept Mr Pathiranalage's claim there is a shortfall in his holiday pay of \$925.33 (gross) and he did not receive payments for holiday pay on the ending of his employment in that amount from AKL.

Interest

[21] Mr Pathiranalage claims payment of interest on sums owed to him. The Authority has discretion to order interest in any matter involving the recovery of any money, such interest to be included in the sum for which judgment is given, and calculated in accordance with Schedule 2 of the Interest on Money Claims Act 2016,

⁷ Section 23, HA.

⁸ Gross earnings based on payslips and cash payment of \$34,137.50, plus calculated wages shortfall of \$30,735.00, plus alternative holiday payment of \$2,135.00.

on the whole or part of the money between the date when the cause of action arose and the date of payment in accordance with the Authority's determination.⁹

[22] While I accept that Mr Pathiranalage has been without his wages and holiday pay since 5 March 2024 when his employment ended, that is due to the default of AKL against whom I am unable to make orders because the liquidator has declined consent to proceed. I therefore do not consider it an appropriate exercise of my discretion to order Mr Navaratne de Alwis to pay interest on amounts that AKL has defaulted on and which I am unable to order AKL to pay. I decline to order interest.

Should leave be granted to recover from Mr Navaratne de Alwis personally?

[23] Mr Pathiranalage asks the Authority to grant him leave under s 142Y(2) of the Act to recover outstanding wages and other money including annual holiday entitlements from Mr Navaratne de Alwis personally, to the extent that AKL is unable to pay. The Authority is able to consider Mr Navaratne de Alwis' personal liability even though AKL is in liquidation.¹⁰

[24] To decide whether I should grant leave, I must answer the following:

- (i) Has there been a default in the payment of wages or other money payable to the employee?
- (ii) If so, is the default due to a breach of employment standards?
- (iii) If so, is Mr Navaratne de Alwis a person involved in a breach of employment standards?
- (iv) If so, is AKL unable to pay the arrears in wages or other money?

[25] Mr Pathiranalage says AKL failed to pay him wages for all hours worked, failed to pay minimum wage for all hours worked, and failed to pay his annual holiday entitlements. As a consequence, he says AKL has breached the WPA, the MWA and the HA which are breaches of employment standards.

⁹ Clause 11, Schedule 2 of the Act.

¹⁰ *Lawton v Steel Pencil Holdings Limited (in liquidation)* [2021] NZEmpcC 199 at [37].

[26] Mr Pathiranalage says Mr Navaratne de Alwis is the sole director of the company and is responsible for management and administration of AKL. He submits Mr Navaratne de Alwis has been directly or indirectly knowingly concerned in or party to breaches of employment standards and has aided or abetted the breaches because he has knowledge of the essential facts that establish contravention by AKL.

[27] Mr Navaratne de Alwis acknowledges the default and that there is money owing to Mr Pathiranalage. As noted above, Mr Navaratne de Alwis' explanation is that AKL could not afford to pay Mr Pathiranalage. He does not offer any legal defences to the claims.

[28] At the investigation meeting, Mr Navaratne de Alwis agreed he was the controlling hands and mind of the company. Mr Navaratne de Alwis had a "silent partner" who invested money into AKL, but who had very few dealings with the business day-to-day and only limited involvement with the staff. Mr Pathiranalage says the only time he contacted the business partner was when he could not get hold of Mr Navaratne de Alwis and this was mostly in relation to issues like supply of products. Mr Navaratne de Alwis confirmed his business partner was not involved in the employment of staff and his only concern was cash flow and investment. It was Mr Navaratne de Alwis who recruited Mr Pathiranalage and signed his employment agreement on behalf of the company. After Mr Pathiranalage started working for AKL, it was Mr Navaratne de Alwis who set staff rosters and kept records.

[29] The initial report from the liquidators¹¹ confirms it is unlikely that any distribution will be made to employees and Mr Pathiranalage was provided with a letter from the liquidator¹² confirming that the liquidator does not expect to make any distribution to creditors of the company. Following the investigation meeting, Mr Pathiranalage filed a claim with the liquidators. The six-monthly report from the liquidators¹³ states the liquidation will be brought to an end before the next six-monthly report (due October 2025) and reiterates the position that the liquidator does not expect to make any distributions to any class of creditor of the company.

¹¹ Liquidator's First Report and Notices to Secured and Unsecured Creditors as at 30th September 2024, (para 6.8).

¹² Dated 2 October 2024.

¹³ Liquidator's Six-Monthly Report (3 April 2025).

Analysis

[30] I have found there was a default in the payment of wages and holiday pay to Mr Pathiranalage. AKL's failures to have paid wages and holiday pay appropriately are breaches of employment standards as defined in s 5 of the Act because they are covered by the provisions of the WPA, minimum entitlements under the MWA, and minimum entitlements and payments under the HA.

[31] Mr Navaratne de Alwis' status as the sole director of AKL means he may be a person involved in a breach of employment standards by AKL if he aided and abetted the breaches or was directly or indirectly knowingly concerned in, or party to, the breaches.¹⁴ The level of knowledge required to establish liability for a person involved in a breach of employment standards is knowledge of the essential facts that establish the contravention by the employer. In this case, Mr Navaratne de Alwis has not raised a legal defence of reasonable reliance on information supplied by another person, or taking all reasonable and proper steps to ensure compliance¹⁵ and there is no evidence before the Authority to support that the legal defence is available.

[32] Based on the evidence before the Authority, I find Mr Navaratne de Alwis was a person involved in AKL's breaches of employment standards because he was the sole director and the "hands and mind" of the company. He controlled all aspects of AKL's operations including creating and signing Mr Pathiranalage's employment agreement, keeping AKL's records, paying wages including in cash, directing hours of operation and the nature of the work to be done. He was deeply and personally involved in the day-to-day management of the company. When Mr Pathiranalage stopped being paid for his work, he raised this issue directly with Mr Navaratne de Alwis and I am satisfied Mr Navaratne de Alwis had direct knowledge of the wages and holiday pay issues. He had the required knowledge to establish liability as a person involved in any breaches of employment standards by AKL.

[33] I am satisfied on the evidence that AKL is unlikely to pay any employees, including Mr Pathiranalage, his wages and other money owing. Because the liquidators have declined consent for the Authority's proceedings to continue against the company, no orders can be made against AKL.

¹⁴ Section 142W of the Act.

¹⁵ Section 142ZD of the Act.

[34] In this situation, I consider it appropriate to grant the application made by Mr Pathiranalage so that if AKL is unable to pay his wages and holiday pay arrears, Mr Pathiranalage is granted leave to seek to recover money from Mr Navaratne de Alwis. This will become apparent after the liquidator has confirmed the outcome of Mr Pathiranalage's claim as an unsecured creditor. If and when the liquidator finally confirms no distributions will be made, then Mr Pathiranalage can recover the money owing from Mr Navaratne de Alwis personally.

[35] I grant leave under s 142Y of the Act for Mr Pathiranalage to seek to recover personally from Mr Navaratne de Alwis, unpaid wages and unpaid holiday pay that AKL is unable to pay.

Penalty

[36] The Authority has full and exclusive jurisdiction to deal with actions for the recovery of penalties.¹⁶ Mr Pathiranalage accepts a penalty is not available under the WPA and MWA against Mr Navaratne de Alwis personally.

[37] However, Mr Pathiranalage says the Authority should impose a penalty on Mr Navaratne de Alwis under s 134(2) of the Act, which allows the Authority to impose a penalty on any person who incites, instigates, aids or abets any breach of an employment agreement. The maximum penalty that can be ordered against an individual is \$10,000.00. Mr Navaratne de Alwis has been on notice of Mr Pathiranalage's intention to pursue a penalty against him for a breach of the employment agreement since the statement of problem was filed on 10 August 2024. Mr Navaratne de Alwis did not file a statement in reply responding to any of Mr Pathiranalage's claims, including the penalty claim.

[38] Mr Pathiranalage says the breach of his employment agreement relates to being underpaid the balance of his wages for much of his employment, and not being paid any wages at all for four weeks of his employment. Mr Pathiranalage says the failure to pay him his contractual hourly wage throughout his employment was a significant breach, and Mr Navaratne de Alwis was complicit in that breach.¹⁷ Mr Pathiranalage submits a penalty is warranted because he was a vulnerable worker as his visa was tied to his employment. Mr Pathiranalage had expected to stay in New Zealand for three

¹⁶ Section 133 of the Act.

¹⁷ *Nicholson v Ford* [2018] NZEmpC (EC).

years, but because of what happened with his employment at AKL he had to abandon his work visa and leave New Zealand. He says a penalty of \$5,000.00 would be justified, and as the breach resulted in a non-compensable loss, Mr Pathiranalage says the grounds are met for the penalty to be paid to him.

[39] Mr Navaratne de Alwis says he did not act intentionally when he did not pay Mr Pathiranalage, but was acting on the mistaken basis that he thought Mr Pathiranalage was on a 30-hour a week contract. In relation to his personal financial situation, Mr Navaratne de Alwis says the Authority should not impose a penalty because he has no money to pay - he works six days a week at two jobs, and has financial debts.

Analysis

[40] In deciding whether to impose a penalty, and if so how much, I have to be satisfied that the imposition of a penalty would meet the purposes and principles of penalties. I need to consider the factors in s 133A of the Act and the approach set out by the Full Court in *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited*.¹⁸ These principles have been elaborated on and followed since.

[41] The law in respect of quantification of penalties is well established given s 133A of the Act, and requires that I have regard to the object of the Act; the nature and extent of any breach; whether it was intentional, inadvertent or negligent; the nature and extent of any loss or damage, steps taken to mitigate the effects of the breach, circumstances of the breach including vulnerability of the employee; and previous conduct. This is a non-exhaustive list of considerations.

Object of the Act

[42] The purpose of penalties is punitive. They are not imposed to remedy a loss, but to punish the person who has breached a duty under the Act and to condemn the behaviour. Mr Pathiranalage says the main breach by Mr Navaratne de Alwis was in aiding or abetting AKL's failure to pay him in accordance with his employment agreement. He says that Mr Navaratne de Alwis' actions were deliberate and wholly inconsistent with the object of the Act to promote the effective enforcement of employment standards.

¹⁸ *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC at [143].

[43] In determining the penalty claim I follow the four-step approach as set out by the Employment Court in *Borsboom v Preet*.¹⁹

Step 1: Identify the nature and number of the breaches and the maximum penalty available

[44] I start with an assessment of the nature and extent of the breaches. There is one main breach alleged, being that Mr Navaratne de Alwis instigated, aided or abetted AKL's breach of Mr Pathiranalage's employment agreement by failing to pay his contractual hourly wage throughout his employment. The maximum penalty for a single breach by an individual is \$10,000.00.

Step 2: Assessment of the severity of the breaches

[45] I accept Mr Navaratne de Alwis' evidence that the breach relating to underpaying Mr Pathiranalage was unintentional because he assumed Mr Pathiranalage was on a 30-hour per week agreement as other employees were. However, that does not excuse Mr Navaratne de Alwis' actions, because he agreed to the terms of Mr Pathiranalage's employment before the employment started, and he should have known and abided by those terms. The total failure to pay Mr Pathiranalage for four weeks in January to February 2024 was deliberate and intentional in that Mr Navaratne de Alwis decided that AKL did not have funds to pay its workers and so Mr Pathiranalage was simply not paid.

[46] Mr Pathiranalage says the impact of the breaches was significant and caused him significant financial hardship. In particular, the failure by AKL to pay him at all for his last four weeks of employment ultimately meant he had to leave New Zealand.

[47] In terms of mitigating or ameliorating factors, there is no evidence before the Authority regarding previous conduct by Mr Navaratne de Alwis. However, there is some need for specific deterrence to ensure Mr Navaratne de Alwis appreciates the significance of his obligations to ensure compliance with the terms of an individual employment agreement. As observed by the Full Court in *Borsboom*²⁰ it is a matter of common knowledge that minimum holiday entitlements and other statutory minima are applicable to all employment. While the tenor of Mr Navaratne de Alwis' evidence

¹⁹ Above n18 at [137] to [151].

²⁰ Above n18.

was that any breaches by AKL were inadvertent, he had personal responsibility to ensure he was not aiding and abetting breaches of Mr Pathiranalage's employment agreement. In terms of general deterrence, a message should be sent to other like-minded directors who might be tempted to treat contractual requirements as optional.

[48] I assess the seriousness of these matters as justifying a starting point for the breaches of 50% percent of the maximum. This brings the working total to \$5,000.00 before considering ability to pay and proportionality.

Step 3: Financial circumstances of Mr Navaratne de Alwis

[49] Mr Navaratne de Alwis' evidence suggests he is in a financial position which would make it difficult to pay a penalty. He has debts to his family members among others. He works six days a week at two jobs and his main job is in the bakery section at a supermarket.

[50] Mr Pathiranalage points out that Mr Navaratne de Alwis is in full-time work, and even if he has other debts, this is no reason not to order a penalty.

[51] No supporting evidence has been provided to show Mr Navaratne de Alwis' personal financial situation. There is no information to support that a reduction to an otherwise appropriate penalty may be appropriate based on Mr Navaratne de Alwis' ability to pay. I therefore decline to reduce the penalty.

Step 4: Proportionality or totality test

[52] Penalties should be set at a level which both punishes a party for its breaches and deters it from future non-compliance. The Authority must take into account whether any penalty would be significantly out of proportion to the gravity of the breaches, and whether there is a real risk that a penalty could be of such magnitude as to create a significant risk of non-payment.²¹

[53] Mr Pathiranalage says Mr Navaratne de Alwis took a cavalier approach to time recording and payroll and his actions were a breach of good faith.

[54] I have considered an appropriate figure in comparison to other cases – particularly relating to breaches of an individual employment agreement. I have

²¹ Above n18 at [147].

considered the seriousness of the breaches in relation to the total amount of the default. I accept the impact on Mr Pathiranalage – particularly in relation to the complete failure to pay him for the last period of his employment was profound and significant. However, the amount of the penalty should not be disproportionate to the amount of the debt. Standing back and looking at the matter in totality and taking a proportionate approach to the overall circumstances, I consider a fair and appropriate penalty to be \$3,000.00.

Whether some of the penalty should be awarded to Mr Pathiranalage

[55] I have considered whether Mr Pathiranalage should receive some of the penalty. There is a public interest element.

[56] In *Borsboom v Preet*²² the Court held that a decision under s 136(2) will be based on the facts, but where a breach has resulted in a non-compensable loss to the employee (that is where the breach claimed is in the nature of ‘performing a public duty’) it may be more appropriate to order some of the penalty be paid to the employee, especially to the extent that costs may not adequately compensate the employee. A breach of an individual employment agreement is such a breach. Mr Pathiranalage has been directly affected by Mr Navaratne de Alwis’ failures. On that basis, I consider it appropriate to award 66% of the penalty to Mr Pathiranalage.

[57] Mr Navaratne de Alwis is to pay a total penalty of \$3,000.00 within 28 days of the date of this determination, with \$2,000.00 being paid to Mr Pathiranalage and \$1,000.00 being paid to the Crown.

Costs

[58] The power of the Authority to award costs is set out in Schedule 2, clause 15 of the Act. Costs are at the discretion of the Authority and must be reasonable. The Authority has adopted a daily tariff approach as the starting point for considering costs, being \$4,500.00 for the first day of hearing. The parties can expect the Authority to apply the daily tariff unless there is good reason to depart from it. The principles and the approach adopted by the Authority in which an award of costs is made are settled and set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz*²³ as confirmed

²² Above n18.

²³ EMC Auckland AC28/06, 12 May 2006.

in *Fagotti v Acme and Co Limited*.²⁴ Costs are not to be used as a punishment or an expression of disapproval of the unsuccessful party's conduct. The financial situation of the party paying costs can be a relevant factor to take into account. Awards made should be modest, and consistent with the Authority's equity and good conscience jurisdiction.

[59] As the successful party, Mr Pathiranalage is entitled to a contribution to his costs actually and reasonably incurred. Mr Pathiranalage's counsel acts on a pro bono basis, which means that Mr Pathiranalage has not personally incurred any legal costs, and the cost has been incurred by Community Law Wellington & Hutt Valley (CLWHV) on his behalf. Mr Pathiranalage seeks a contribution to costs of \$4,500.00 (based on a one-day tariff) to be paid to CLWHV relying on the decision of the Employment Court in *Innovative Landscapes (2015) v Celia Popkin*²⁵ in support of his submission that an order for costs should be made notwithstanding he has not actually incurred legal costs. While the decision in *Innovative Landscapes* concerned the application of the Employment Court's discretion, the reasoning is applicable to the discretion to be exercised by the Authority. I find that making a costs order in these circumstances is consistent with the Authority's broad discretion informed by the underlying purposes and objectives of the statutory scheme. I consider an award of costs in the amount of \$4,500.00 is both modest and appropriate in the circumstances.

[60] I order Mr Navaratne de Alwis to pay \$4,500.00 to Mr Pathiranalage as a contribution towards costs within 56 days of the date of this determination. It is a condition of my order that the full amount of \$4,500.00 is to be paid by Mr Pathiranalage to CLWHV within 7 days of payment being received by him. I also order Mr Navaratne de Alwis to reimburse Mr Pathiranalage the filing fee of \$71.55 within 28 days.

Summary of findings and orders

[61] Mr Pathiranalage has been successful in his claims.

[62] Amaa & Kash 23 Limited (In Liquidation) failed to pay Mr Pathiranalage wages of \$7,079.80 (gross) and holiday pay of \$925.33 (gross) when it became due.

²⁴ [2015] NZEmpC 135 at [114].

²⁵ [2020] ERNZ 262.

[63] The Authority grants leave under s142Y of the Act for Mr Pathiranalage to seek to recover personally from Mr Navaratne de Alwis, unpaid wages and unpaid holiday pay that Amaa & Kash 23 Limited (In Liquidation) has defaulted in paying him and which the company is unable to pay.

[64] Nishan Navaratne de Alwis is ordered to pay Damith Pathiranalage within 28 days of the date of this determination:

- (a) A penalty of \$3,000.00, being \$2,000.00 to Mr Pathiranalage and \$1,000.00 to the Crown.
- (b) The filing fee of \$71.55.

[65] Nishan Navaratne de Alwis is ordered to pay Damith Pathiranalage within 56 days of the date of this determination:

- (a) Costs of \$4,500.00. The full amount of \$4,500.00 is to be paid by Mr Pathiranalage to Community Law Wellington & Hutt Valley within 7 days of payment being received by him.

Natasha Szeto
Member of the Employment Relations Authority